United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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No. 75-7600

United States Court of Appeals
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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Summary Analysis of Defendants' and *Amici's* Positions

The dominant fact arising from the 128 pages of answering briefs filed by defendants and their *amici* associates is that they, not CBS, are writing (to use ASCAP's words) "as if there had never been a trial, as if this Court had not affirmed the trial court's findings," and as if the Supreme Court had not given "decisive guidance to this Court on the issues now presented" (Br. 3).

For example, "decisive guidance" is not contained, as defendants would have it, in a description of how blanket licensing serves radio stations or taverns, or in a recitation of

some of the reasons for ASCAP's formation in 1914. Rather, it lies in the critical distinction the Court drew between markets in which blanket licensing is *now* "reasonably necessary" and those in which it is not (*e.g.*, the distinction between "itchy fingers" and "restive batons" on the one hand, and uses for which direct licensing can operate, on the other) (99 S. Ct. at 1562, 1563 & nn.34, 37).

For if it is not "reasonably necessary" for otherwise-competing performance rights to be sold in a blanket for network use, then the blanket license is not a "separate product" in that market, but a means of restraining price competition, without justification, on those otherwise-competing products.[1]

The examples the Supreme Court gave for markets in which blanket licensing is not "reasonably necessary" were dramatic rights and synch rights (99 S. Ct. at 1563 n. 37). That this case falls in the same category is neither disputed nor disputable. That is why defendants do not address the passages of the Supreme Court opinion which set forth that distinction.

Nor do defendants dispute, for they cannot, the separate factual propositions which place their practice on the unlawful side of that distinction:

> (1) that the market involved in this case—the licensing of performance rights for television network use—is not now, and never has been, price competitive;

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[1] In the *amicus* brief for the United States the position is taken that since blanket licensing is not unlawful *per se,* it cannot be "price-fixing," because that term includes only the practice which is unlawful *per se* (Br. 11). The point is semantic only, especially given the Government's acknowledgment that there is no price competition in this market and that that is a "particularly significant" anticompetitive effect (Br. 17).

The Supreme Court recognized that blanket licensing literally involves the fixing of price, but held that not all literal price-fixing is necessarily illegal *per se* (99 S. Ct. at 1556-57). The basis for that recognition is clear.

For all music publishing corporations to agree to sell at $1,000 a use would be conventional price-fixing. For those publishers to pool their rights, agree to license the pool for $5 million a year, and distribute $1,000 a use to themselves (*i.e.,* the present blanket system) is functionally equivalent, except for at least one fact that makes it worse (*see* discussion at 27-28, *infra,* regarding the "restricted output" contention of *amici* Copland, *et al.*).

(2) that it can be fully competitive;

(3) that defendants can make it competitive, simply by stopping their own practice of blanket licensing (with an interim workout of music-in-the-can); and

(4) that they can so cease without the slightest risk or cost to themselves, except those attributable to

(a) price competition; and

(b) the sort of selling expenses which normally occur in competitive markets and which these same sellers now profitably incur in more than 60,000[2] movie, synch, print and mechanical rights transactions each year.

Each and every one of those points is substantiated by findings defendants elide: those depicting the efficient operation of other music rights markets, those concluding that direct licensing in this one would be "feasible," "convenient" and "efficient,"[3] and, of course, those setting forth the terms of the blanket license. 400 F. Supp. at 742-43, 758, 759-60, 764; 562 F.2d at 132-33, 134 n.9, 135 & n.13, 138; 99 S. Ct. at 1555, 1563 n.37; *id.* at 1566-67, 1569 & n.25 (Stevens, J.).

Moreover, the district court found, as *existing* facts, or this Court concluded based on those findings:

(1) that the blanket license precludes price competition by its terms throughout the period of the license (results in "the threshold elimination of price competition") (562 F.2d at 136; 337 F. Supp. at 400);

(2) that it additionally provides a disinclination to compete *vis-a-vis* users who might not accept those terms (562 F.2d at 139, 140);

(3) that the members have a "strong preference" for it because of their "apprehension" of "intense competition" and their desire for "bargaining clout" (400 F. Supp. at 767);

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[2] 400 F. Supp. at 760; Berman Tr. 829.

[3] The district court found that the licensing of "inside" music (that especially written for the program or owned by a publisher-affiliate of the packager) could be directly licensed "conveniently" (400 F. Supp. at 758) and that the direct licensing of "outside" music would be "efficient" (*id.* at 764). With respect to the latter, the court stated that the music publishing corporations "would logically create an *efficient* mechanism to facilitate it [direct licensing] (as they have in the case of other music rights)" (*id.,* emphasis added).

(4) that each network has a "large inventory" containing "music-in-the-can" (*id.* at 775; 562 F.2d at 135 n.14);

(5) that there are no present facilities for the direct licensing of music performance rights for network use (400 F. Supp. at 757, 759); and

(6) that no network could cancel its blanket license "tomorrow," but rather that a bypass would require "a long period of advance preparation" of at least one year (*id.* at 759, 777).

It is certainly not CBS which is "ignoring" those findings either. As Justice Stevens stated, they "confirm the illegality of [defendants'] conduct" (99 S. Ct. at 1570). It is defendants who needfully do so.

Indeed, what defendants rely on are not findings at all, but predictions as to how the present problems caused by the existing found facts might be overcome (*e.g.*, without encountering "refusals to deal" or concerted "hold-ups"), which are irrelevant in law to any issue presented.

Based on such predictions, defendants say that blanket licensing has no anticompetitive effects whatever (BMI Br. 9; ASCAP Br. 29). But of what are the findings just stated, if not anticompetitive effects? And if blanket licensing had no anticompetitive effects whatever, is it likely that this Court would have held it unlawful *per se*?

Moreover, while defendants assert that the blanket licensing of networks has procompetitive effects (BMI Br. 23-26; ASCAP Br. 12-14), the findings they ignore necessarily refute that, too. The salient condition exacted by the blanket license is that there be *no* direct licensing and therefore *no* competition on price. By its terms, it eliminates price competition. And a contract which eliminates price competition by its terms cannot possibly be procompetitive, when it is not "necessary," "reasonably" or otherwise, to "make a market" that would permit product competition to occur—*i.e.,* when the district court has found that direct licensing (featuring both price *and* product competition) would be perfectly "feasible," "convenient" and "efficient."

Had the presence of anticompetitive effects and the absence of procompetitive justification ever properly been in doubt, the Government brief (added to Justice Stevens' analysis) thoroughly clears the air.

The Government notes two "factually undisputed anticompetitive characteristics of the market" in question which represent "substantial deviations from the competitive norm" (Br. 16, 18): (1) the "particularly significant" absence of price competition (Br. 17); and (2) "the undisputed fact of price discrimination" (Br. 20 n.11). These "characteristics" of blanket licensing, the Government correctly perceives, "impose the burden on the defendants to justify its continued use" by showing, not only procompetitive benefits that outweigh the anticompetitive effects, but also that blanket licensing is "no more restrictive than necessary" to achieve any such benefits (*id.* at 20).

It should be emphasized that the Government position is based entirely on the *present* anticompetitive characteristics of the market—not on the *additional* anticompetitive effects of barriers to a bypass. Hence, the Government rejects, as it should, defendants' contention that the bypass alternative renders present anticompetitive characteristics irrelevant. Indeed, the Government states that, given "the undisputed evidence of certain noncompetitive market characteristics," "defendants should lose if they have failed to introduce sufficient evidence to justify their collective practices" (Br. 9 n.5, 20).[4]

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[4] The Government's "one caveat" on this point (Br. 9 n.5) may be quickly dispelled. It is that defendants should be afforded another trial if their failure to have offered evidence of procompetitive justification was attributable to their being misled by CBS into a belief that "justification" was not to be tried or that the issue was solely "compulsion."

The short answer is that "justification" was explicitly stated as an issue for trial by the pretrial order in this case (June 12, 1972)—and so stated *in addition to* "compulsion" (indeed, the latter was injected over CBS's objection as an element of the price-fixing and rule-of-reason offenses). The court framed the issues as follows:

"(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;

"(ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anti-competitive means."

(Footnote continued on next page.)

Had the Government gained sufficient familiarity with the record to enable it to assess the alleged procompetitive effects (a familiarity which it disclaims), the guidelines it articulates would have permitted it only one answer to that question: that defendants have adduced no such evidence, because no such benefits exist.

For, as to claimed "efficiencies," the Government properly concludes that only those which "are so significant that, without them, a competitive market could not function" could be held to offset significant anticompetitive effects, because,

> "To countenance a significant restraint of competition for cost savings alone would constitute an improper judicial rejection of the congressional determination that, in the long run, greater competition provides the best means of lowering cost and spurring innovation." (Br. 22 n.15)

Defendants have failed to prove any cost savings, much less such market-functioning necessity. In fact, they agree there is no such necessity, and the district court so found.

As to other alleged "benefits" (monitoring, insurance and immediate access), the Government states that these "may *not* be attributed to the blanket license and weighed against the anticompetitive effects of such licenses" unless they are "necessary to create a market" and cannot be "done without a blanket license" (Br. 22 & n.15, emphasis in the original).

Accordingly, our trial memorandum of April 25, 1973 (at 4-6), set forth two major issues that we were preparing to try: "Combination in Restraint of Trade" and "Justification Under the Rule of Reason." Under the latter heading we defined such trial issues as whether the market would "function effectively and more competitively" than it now does, if per-use licensing were inaugurated or "if ASCAP and BMI were enjoined from licensing television networks." And, of course, throughout our case-in-chief, we adduced proof upon proof to anticipate and rebut any potential claim of "efficiencies" or other alleged procompetitive benefits. We even announced that purpose as we proceeded (*e.g.*, "one of the things we are trying to show is the fact that the Fox Agency really handles these [direct licensing] transactions at relatively low cost" because "the cost of acting as a clearing house for transactions of this nature has a bearing on the feasibility point of the case," Tr. 857).

Defendants' failure to meet that proof was not caused by any unawareness of the issue but by the lack of any substance to a justification defense.

But fully adequate access and indemnification are now enjoyed by users in movie rights, television synch rights and other music fields in which licensing is done directly, and publishers there monitor effectively and efficiently (400 F. Supp. at 759-60, 764; PX's 550, 552-58; Berman Tr. 838-41; Mingle Tr. 883-85). Also, the district court's finding regarding the feasibility of direct licensing in the present market should logically preclude a contention that these "benefits" are "necessary." Moreover, the district court explicitly found that any monitoring desired could be done "even if [ASCAP and BMI] were forced to forego the issuance of blanket licenses" (400 F. Supp at 781-82, n.23).[5]

The logic, then, of the Government's position requires a reversal based on the findings already made: for the two significant anticompetitive effects (the absence of price competition and the presence of economic discrimination) are offset by no procompetitive benefits whatever.

Furthermore, the Government recognizes (even if it does not hinge its analysis on) "the economic barriers to direct dealing which the blanket license and its concomitant disinclination effect produce" (Br. 19). When there is added the district court's pertinent findings regarding music-in-the-can and a year-long effort—neither of which the Government

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[5] The Government believes that the district court's error in concluding that blanket licensing has no anticompetitive effects made it unnecessary for the court to consider whether monitoring "can be done without a blanket license" (Br. 22). That is true, but the court nevertheless made that finding.

CBS had argued below that ASCAP's policy of withholding monitoring services from direct licensing (as evidenced in the 3M incident) is perceived by members as a sanction imposed on direct licensing, which adds to their disinclination to compete. The district court misunderstood that it had been asked to rule on whether ASCAP's withholding of this *member*-related service was a tie-in imposed on CBS (*e.g.*, "CBS has no standing to assert such a claim because the member or affiliate, rather than CBS, is the alleged victim of the tie," *id.*). It was in that connection that the court found that monitoring could be performed in the absence of blanket licensing and even suggested that the members might "readily forego such services to have their compositions performed on CBS" *(id.)*.

Hence, monitoring is hardly a "necessity" point or one requiring a remand for additional findings.

discusses—the anticompetitive side of the scales is depressed considerably further than it need be for illegality to be perceived.

Finally, the Government states that evidence that blanket licensing has been continued in this market past the point of "original justification," if any, for the "purpose of limiting competition" will render unnecessary

> "an elaborate inquiry into the actual effects of the conduct . . . for the parties themselves are presumed to have an accurate impression of the likely competitive effects of their actions on the market in which they operate." (Br. 12)

See also United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 558, 560 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961). Although the Government refrains from reviewing the findings and proof regarding anticompetitive purpose, these, too, are both uncontested and overwhelming.

A. Defendants' Attempts To Escape the Findings of Anticompetitive Intent Serve Only To Reinforce the Significance of Those Findings.

Thus, the district court predicated its findings of defendants' "strong preference" for blanket licensing, not on any desire for monitoring or purported efficiencies, but on their "apprehension" of "intense competition" and their desire for "bargaining clout" (400 F. Supp. at 767).

And those findings were based squarely on defendants' repeated and explicit admissions in testimony and contemporaneous documents—*e.g.*, that their purpose is to "resist the splitting of our ranks so that we can be picked off one by one" (E 450); to provide the "advantage" of not having "to compete for the price" (Nathan Tr. 3909); to implement the principle that "in unity there is strength" (Brettler D 201); to gain, in short, precisely that sort of "bargaining clout" that comes from combining rather than competing (400 F. Supp. at 767).

Defendants never mention those findings or admissions, obviously because they cannot explain them away. About the most defendants say, apart from references to Victor Herbert's 1914 state of mind and claims of utility in *other* markets, is that the district court found that ASCAP members would not "refuse to deal" in a network bypass—"at least," as the district

court added (although to this, defendants also neglect to refer), "*ex necessitate*" (*id.* at 770). That finding does not refute anticompetitive intent—it reconfirms it.

Against findings of intent this stark, ASCAP affects indifference as to whether it offers blanket licenses to networks or not (Br. 5, 12, 16). And while BMI notes that

> "In their amici briefs, ABC and NBC state, in effect, that they do not want their current blanket licenses and that the blanket license need not be retained in the marketplace for their benefit" (Br. 30 n.21)

—it then professes to continue blanket licensing only for the networks' own good and the good of as yet unborn television networks (Br. 26 n.16, 30 n.21).

But if ASCAP and BMI were as indifferent or altruistic as they pretend regarding the blanket licensing of networks, why have they fought this suit, whose sole objective is to stop or alleviate that practice—and fought it vehemently up to the Supreme Court and down again—for 10 costly years?

The disingenuousness of this pretension further gives the game away.[6]

B. Defendants' Attempts To Escape the Findings of Anticompetitive Effects Serve Also To Reinforce the Significance of Those Findings.

Defendants rhetorically ask: How can the "mere" offering of a blanket license have anticompetitive effects (ASCAP Br.

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[6] It may be noted that BMI claims that it will be hurt by a decision of copyright misuse, stemming from a holding on liability, because CBS will expect a refund of all interim payments made to BMI since 1969 (Br. 22). But, as BMI well knows, CBS has repeatedly stated that it expects to pay for the music it uses, and pay a fair competitive price. There is only one way such prices can be approximated for past years—and that is based on the evidence arising from direct licensing transactions that will ensue, if relief is granted in this case. And that is the basis which we will ask the district court to adopt, pursuant to its September 25, 1972 Order, in making "retroactive adjustments" in the interim fees paid thus far.

BMI also points to the CBS defense of copyright misuse to a BMI state court action regarding the years prior to 1970 (Br. 22). We make the following offer: If BMI will now voluntarily discontinue the blanket licensing of television networks, or offer to license them on a per-use basis, we will waive that defense.

12; BMI Br. 12)? The answer (apart from the fact that such offering is not "mere") is obvious:

> (1) it is a means by which many independent corporate entities—music publishing corporations—agree upon the prices at which they will sell;
>
> (2) it is a means of obtaining from the network user a commitment not to buy in a competitive market during the license term (or, more realistically, not to seek to *create* such a market—not to embark on a "competitive crusade");
>
> (3) it is a means of perpetuating a disinclination to compete on the part of ASCAP's members; and
>
> (4) it is a means of achieving economic discrimination in their favor.[7]

But, say defendants, CBS has a "free choice" not to accept the blanket license (*see* ASCAP Br. 5, 24; BMI Br. 6).

To the extent that argument means that there are "no barriers" to the creation of competitive conditions (which defendants also exclaim (ASCAP Br. 4, 20; BMI Br. 5, 17)), it is contrary to the findings, and egregiously so—as we will show in a moment.

To the extent it means that such barriers are surmountable, it is consistent with the district court's predictions but both irrelevant and confused—which we show now.

1. It should initially be stressed that CBS has no choice, "free" or otherwise, about ASCAP members agreeing on price. They do that before CBS has any contact with them.

And CBS has no choice, "free" or otherwise, about the terms of the blanket license, particularly the term that forecloses it from a competitive market. Those are the only terms that ASCAP offers.

And certainly CBS has no choice, "free" or otherwise, about the "inevitable" economic consequences of the blanket system which "dulls [the members'] incentive to compete" (562 F.2d at 139).

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[7] The latter subject is discussed at further length at 30-31, *infra*.

Thus, the "choice" defendants proclaim is a choice to resort to a self-help *alternative* to an anticompetitive deal contrived by a consortium of sellers.

But alternatives of that sort should be irrelevant as a matter of law.

The target of a price fix (or any anticompetitive practice) always has some alternatives to capitulating: he can find other suppliers who are not parties to the fix; he can wear down the disinclination of the conspiring sellers to compete on price; or, with enough time and money, he can even manufacture the product himself.

That is why, we submit, the Supreme Court indicated the test of illegality without reference to any barriers to a bypass—*i.e.*, as a distinction between blanket licensing which is "reasonably necessary" and blanket licensing which is not (99 S.Ct. at 1562, 1563 & nn.34, 37). And that is why the Government has stated that

> "the most accurate manner in which to assess the legality of ASCAP and BMI's blanket licensing practices relating to the television networks is to recognize the undisputed fact that the market reflects substantial deviations from the competitive norm." (Br. 16)

In short, the Sherman Act presupposes that competitive markets shall exist as of *right*—the right of the buyer. If they do not exist, though they are capable of so doing, and in their place is an anticompetitive contrivance, agreed upon and participated in by all sellers in the United States, then the court should intervene to stop that practice and allow competition to develop.[8]

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[8] This situation is the exact opposite of the facts involved in the two cases on which BMI principally relies, *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931) and *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1267 (1979).

Standard Oil presented a classic market-necessity case: that of blocking patents. *See International Manufacturing Co. v. Landon, Inc.*, 336 F.2d 723, 729 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc. v. Landon, Inc.*, 379 U.S. 988 (1965). Hence, a market was there "made" which would not otherwise have existed. In *Ohio-Sealy*, the court struck down restraints which lacked market-necessity,

(Footnote continued on next page.)

Thus, our claim is not dependent on the existence of barriers to an *alternative* to an anticompetitive method of sale; it is dependent on the unnecessarily anticompetitive nature of the terms of that contract and the agreement among sellers which support those terms. And while those barriers to the alternative fortify our case, because they are anticompetitive effects added to the rule-of-reason analysis, they are icing on that cake.[9]

2. Yet that icing is most certainly on that cake. For those barriers do exist; the district court so found. And their surmountability is irrelevant as a matter of law; the Supreme Court so held by implication.

Defendants themselves herald, as if it were dispositive of this suit, the Supreme Court's reference to the district court's findings of surmountability—*e.g.,* that there is nothing "preventing" CBS from embarking upon what Justice Stevens later called a "competitive crusade" (99 S. Ct. at 1558; *id.* at 1571 (Stevens, J.)). But if the Supreme Court actually thought those

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but permitted joint-selling to such national accounts as Sears and Ward's, since that practice was proven to be reasonably necessary to enable Sealy to compete with other national brands. Hence, joint-selling activity there created a viable competitor where one would not otherwise have existed and thus increased "interbrand competition with no diminution of intrabrand competition" (585 F.2d at 838). *See White Motor Co. v. United States,* 372 U.S. 253, 256-58 (1963); *id.* at 268-70 (Brennan, J., concurring).

[9] The same reasons discredit defendants' contention that CBS cannot complain of their blanket-only practice until CBS has "tried" the bypass alternative (BMI Br. 5). Indeed, it would be difficult to construct a rule more antithetical to antitrust purposes than one requiring a plaintiff, as a condition of suit, to hurl himself against a known wall simply to prove what everyone recognizes: with enough time, money and effort, he could ultimately surmount it.

From a defendant's standpoint such a rule would be tantamount to a "heads I win, tails you lose" proposition. Before the attempt, there would be no case. During the attempt, while success were still indeterminate, there would still be no case. After the attempt succeeded, it is highly questionable that there would be a case for injunctive relief because success would have mooted the issue.

Would the plaintiff have a case for damages for the expenses of scaling the defendant's barriers? If not, the Act has really been perverted, and the plaintiff, bilked. But if he is to be given a case for damages for the expenses of climbing the wall, why on earth should he be denied a suit for injunction with the wall standing visibly before him?

findings of surmountability ended this case, as defendants repeatedly declaim with their "free choice" contention, how do defendants explain the Court's conclusion that blanket licensing "may not ultimately survive" the rule-of-reason "attack" to be analyzed on remand (99 S. Ct. at 1565).

3. While ASCAP takes issue with this Court's finding regarding disinclination, it does so in a manner less indicative of opposition than of desperation. For ASCAP claims that this Court's finding "conflicts" with those made by the district court (Br. 18)—but what ASCAP quotes from the district court's opinion are not findings, but again predictions, and not predictions about the disinclination to compete, because that is an existing fact, but, once more, predictions that ASCAP members would not "refuse to deal."

It must be apparent, even to ASCAP, that a rather large difference exists between the inevitable impact of a blanket license in "dulling" ASCAP members' incentive to compete, on the one hand, and outright refusals to deal, on the other hand. It is understandable that ASCAP, in light of the district court's prediction, wishes to pretend that they are the same thing; but plainly they are not.

It is true that three ASCAP publishers admitted, in no uncertain terms, that they would refuse to deal (Goodman Tr. 1631-32; Morris D 656-62; Vogel D 929). It is also true that nine of ASCAP's largest publisher-members (accounting for 40.5% of the ASCAP credits generated on CBS (E 660; AX 160)) in fact refused to deal with 3M (Add. B, at 8-9, 11-32).[10] And if CBS had called all publishers to the stand, and

[10] To put in perspective defendants' reliance on the district court's findings regarding the 3M incident: (a) of the three major publishers (measured by ASCAP credits on network television) which agreed to deal on 3M's first series of tapes (*i.e.*, when the outcome of a bypass was still in doubt) one (Jewel Music) admitted that it would refuse to deal with CBS (indeed, admitted that it had been "wrong" to deal with 3M in the first place (Goodman Tr. 1631-32)) and two others (Shapiro, Bernstein and MCA), while induced by 3M guarantees larger than their total wired music royalties from all sources (Muzak, etc.) and anticipated receipts of between $200,000 and $500,000 apiece (PX's 94, 418, 459E, 459G, 3MPX's 50-52, Chiantia D 312), gave reasons for overcoming their resistance that demonstrated far greater hostility to dealing with CBS (*e.g.*, "grains of sand

(Footnote continued on next page.)

they had all been equally candid, this case would have been very simple, indeed.

But no such extreme standard governs whether their disinclination to compete is an anticompetitive factor that must be weighed on the rule-of-reason scales.

Not only, moreover, does ASCAP decline to mention the admissions of its publisher members referred to above, it even eschews any reference to the copious admissions of the publishers and writers ASCAP itself called. While those members dutifully rendered the testimony they were called upon to give—that they "would deal"—every one of them conceded in almost the next breath that they "strongly preferred" not to (Chiantia Tr. 2919; Broido Tr. 3492, 3500-01; Copland Tr. 3486; Green Tr. 3473-74; Shulman Tr. 3132-34; 400 F. Supp. at 767).

Nor does ASCAP attempt to cope with the economically self-evident point that sellers who already have going for them a highly rewarding, thoroughly noncompetitive, cartelized method of sale will necessarily and inevitably have a disinclination to change.[11] And most strikingly of all, though

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compared to watermelons") (Brettler D 232, 236-37; Chiantia Tr. 2991-92, 3028; Chiantia D 280); (b) the remaining five which dealt on the first series accounted for less than 0.1% of the ASCAP credits generated on CBS (E 660; AX 160); and (c) the 18 which dealt on the second series accounted for approximately 3.5% of those credits (*id.*).

The court's finding that 3M obtained the music it needed on the first series of tapes "in time" is true—but the time it took was six months (Add. B, at 11-40).

The court's finding that 3M paid publishers "three-quarters of the amount of its first offer to ASCAP"—which inspires BMI's assertion of "bargain prices" (Br. 15)—is indisputably wrong as a matter of simple arithmetic. In order to bypass, 3M paid publishers $35 a tape, which was more than $7 a tape in excess of what it would have paid had ASCAP accepted its offer (Add. B, at 9 n.).

[11] What defendants do say here simply misperceives, we submit, this Court's conclusion. The finding of disinclination is not based, as defendants claim, on the "assumption that the copyright owner controls the choice" and will refuse to deal (BMI Br. 16; ASCAP Br. 19), but on his "strong preference" not to. Quite logically, this "dulls his incentive to compete" (or, as the Supreme Court stated in *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942), "is a powerful inducement to abandon competition" despite a professed willingness to engage in it when "commercially possible").

ASCAP relies on the district court predictions about refusals to deal, ASCAP fails to mention those findings—about the "strong preference," about the "bargaining clout," and about the "apprehension" of "intense competition"—which categorically support the *disinclination*-to-compete proposition (400 F. Supp. at 767).

4. Similarly, CBS has no "free choice" about the existence of the music-in-the-can problem (although it makes no difference legally whether ASCAP created this problem or stands in safety behind it). When CBS took its first blanket license in 1946, ASCAP's rights were effectively exclusive—*i.e.,* at that point, it had no choice whatever (562 F.2d at 133). From that point on, the problem has been endemic.[12]

ASCAP says CBS has not proven that "exorbitant" premiums would have to be paid in order to license such music (Br. 21). Again, it is understandable why ASCAP would wish the issue to be "exorbitant" premiums rather than premiums over competitive market value—or, as it somehow managed to persuade the district court, concerted "hold-ups," rather than such premiums (400 F. Supp. at 775-76). But "exorbitant" or concerted "hold-ups" are hardly the test of whether such music can be licensed at competitive prices and, therefore, whether this barrier exists.

ASCAP says that no copyright proprietor admitted that he would charge such premiums, so that the point was not proved—it was only substantiated by economists (Br. 21). But one of the economists who substantiated it was the economist whom ASCAP called to the stand, Robert Nathan, who is also the economist who acts as special advisor for the ASCAP distribution system (Tr. 3903, 4052). ASCAP does not refer to that testimony, despite our citation to it in our main brief (Br. 13-14). Another party admitting this point flat out was BMI ("power to name his own price"; "intolerable") (Trial Memorandum, dated April 25, 1973, at 35-36, JA 354)—and, again, no defendant makes mention of this concession.

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[12] Because of ASCAP's then exclusive right under its membership agreement to license performance rights, and because of the broadcasters' consequent lack of choice, ASCAP's assertion that the broadcasters "insisted" on blanket licensing is simply ASCAP "newspeak" for the truth (Br. 11).

ASCAP says that CBS did not prove the "life span" of its $100 million inventory of programs and films as to which the music-in-the-can problem is most evident (Br. 21). But the "life span" is irrelevant. At any point in time that CBS might putatively decide to exercise this "free choice"—*i.e.,* to "embark on a competitive crusade"—it would have to deal with a single source of supply for each of the approximately 13,000 songs already recorded on those films.

We also explained in our main brief why the problem, in the aggregate, would be equally severe, for a single bypassing network, as to the world's stock of films and programs on which the network will wish to bid in the future (Br. 15). Defendants have no answer to that point.

5. Moreover, if the district court had actually made any finding, as defendants claim (ASCAP Br. 4, 20; BMI Br. 5, 17), that there were "no barriers" to a network bypass, one would surely have expected defendants to have quoted that finding. They don't, because there is none. Thus, instead, defendants rely on another district court prediction—that the music publishing corporations would "wait at CBS' door" (400 F. Supp. at 779). Maybe they ultimately would; but *not,* as the district court clearly found, "tomorrow" (*id.* at 759, 777).

We discussed in our main brief the district court's finding that CBS could not cancel "tomorrow" without incurring significant problems, but rather would have to engage in a year-long effort to overcome them (Br. 12-17). We also discussed (Br. 43-45) why that point, in and of itself, is dispositive of this suit under the precedent of *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978).

Defendants, while still uttering "wait at CBS' door," elect not to deal with either proposition. Because they can't. Because those points truly are dispositive under any legal theory of this case.

6. Also, for their "no barriers" contention, defendants point to the district court's statement in its summary of findings that "CBS has failed to prove that there are *significant* mechanical obstacles to direct licensing" (400 F. Supp. at 779 (emphasis added)). But the court was certainly not saying that there

were no mechanical obstacles at all—the court had just described the present lack of direct licensing facilities *as* "mechanical obstacles" (*id.* at 759, 762-63). The only reason those described obstacles were not legally "significant" to the district court was because they were surmountable— after a year-long effort. And that reinforces our case, not defendants'.[13]

7. Finally, defendants state that "the test" of rule-of-reason illegality in this Circuit "is not whether the defendant deployed the least restrictive alternative," because some plaintiff's lawyer could always cobble up a "somewhat" lesser-restrictive alternative to the practice complained of (BMI Br. 3, 8). For this, defendants cite ***American Motor Inns, Inc.*** v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975), and

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[13] What makes so particularly ironic defendants' misstatement of the findings on these points is that defendants themselves are fully aware that there will never be direct licensing if they win this case, precisely because of the existence of these barriers.

For example, BMI admitted the very paragraph of the complaint (para. 15) which asserted the impracticability of a bypass (JA 68-69), and which BMI now contends is inconsistent with the position all parties hold: that direct licensing is distinctly feasible (*see* BMI Br. 2 n.4).

In fact, that allegation is *not* inconsistent with the proposition that direct licensing is feasible (and a bypass, no longer a crusade) once the music-in-the-can problem is solved, disinclination overcome, and facilities installed. (By hindsight, we should have anticipated this charge of inconsistency and set forth those reasons for impracticability in the complaint. For those reasons show that there is no inherent disability to the efficient functioning of a direct licensing market but only presently existing barriers to it, removable by decree.)

Yet BMI's admission of the present impracticability of a bypass cannot be reconciled with its position as to the feasibility of direct licensing, except on the same ground—*i.e.*, that it knows that direct licensing will eventuate, and become distinctly feasible, only after those barriers are removed.

Thus, after filing its answer admitting impracticability BMI stated, on the oral argument of its motion for a preliminary injunction, that direct licensing today "really isn't practical" (JA 159). Thereafter, ASCAP's general counsel testified on deposition that a bypass today is "wholly impractical" (Finkelstein D 548-49). And BMI subsequently proclaimed that CBS would find the music-in-the-can problem "intolerable" (BMI Trial Memorandum, dated April 25, 1973, at 35-36, JA 354).

Other admissions to the same effects are reviewed in Add. E to our brief on the prior appeal.

Berkey Photo, Inc. v. *Eastman Kodak Co.,* 603 F.2d 263 (2d Cir.), *petition for cert. filed,* 48 U.S.L.W. 3174 (September 25, 1979) (No. 79-427), and imply we take the opposite position.

We don't. As we actually stated the test in our main brief (Br. 29-31), it is that the practice complained of must be more restrictive than *reasonably* necessary, which is substantively identical to the proposition, which we also stated, that there be "significantly less restrictive alternatives." And both verbalizations are in fact supported by *American Motor Inns,* 521 F.2d at 1248-49, and *Berkey,* 603 F.2d at 303.

More importantly, however, we are not talking in this case about *"somewhat"* less restrictive alternatives. The difference between the blanket-only system, under which no price competition occurs, and either a per-use system or a total direct-licensing system, under which price competition would flourish, represents the opposite ends of the antitrust poles.[14]

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[14] We recognize that another anticompetitive effect we have asserted—the impact of the ASCAP distribution rates under a blanket system on any direct licensing prices in a bypass attempt—was previously viewed by this Court as a "theoretical assumption" that was not "necessarily so" (562 F.2d at 140 n.27). We respectfully suggest that that statement may not have taken into account defendants' explicit admissions of the inevitability of such a phenomenon (JA 106; Nathan Tr. 4182-83, 4200-01; Chiantia Tr. 2943-44; Vogel D 934-35; ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," dated May 24, 1973, at 2).

Many of those admissions related to the price stabilization effect of standard per-use royalty rates—*e.g.*, the ASCAP brief which stated,

> "The fact is, however, that the per-use rates to be set by the Court would inevitably become the focal point around which any direct licensing transactions would take place . . . ."

The Government *amicus* brief makes the same point even more strongly (Br. 26 n.19). But as ASCAP's economist, Mr. Nathan, acknowledged (Tr. 4200-01), and as is independently obvious, exactly the same is true of the standard per-use *distribution* rates ASCAP applies under the blanket system (*i.e.*, in either event, what the music publishing corporation "sees" is a standard amount from ASCAP, and that is the "focal point" described in the ASCAP brief).

The difference between the two, apart from the fact that per-use licensing would eliminate all other restraints, is that it is inherently a transitional system so that its price stabilization effect will be short-lived, whereas blanket licensing will continue indefinitely unless supplanted by a per-use system or enjoined.

C. Defendants' Attempts To Escape the Findings Regarding the Absence of Procompetitive Justification, Not Only Serve To Reinforce the Significance of Those Findings, But Would Prove Too Much If the Facts They Assert Were True.

1. The core of defendants' and *amici's* argument here is that blanket licensing achieves "substantial" and even "enormous" transactional efficiencies (BMI Br. 25; ASCAP Br. 14, 23; Copland Br. 6, 17, 19). Let's assume for a moment, *arguendo,* that that were true.

In the first place, such assumed efficiencies would be attributable, if they existed at all, to the fact of collective licensing (*i.e.,* the fact that only one collective license must be transacted instead of thousands of direct licenses); they would in no sense be attributable to the way ASCAP *charges* the network for that collective license. Thus, if ASCAP, pursuant to the collective license, billed each network a separate price for each use (*e.g.,* the same amount per use that ASCAP distributes to its members), there would still be only one ASCAP-network transaction and exactly the same efficiencies would be achieved. The difference would be that, instead of sending the network a quarterly bill for X% of the network's revenues or $Y million, the bill would call for the sum of many individual usage fees.

In the second place, that per-use method of billing for the collective license would immediately generate price competition, even assuming that "enormous" efficiencies of licensing through ASCAP precluded many direct licensing transactions. Thus, if each separate price were set by the music publishing corporations themselves, there would be price competition among all songs in the ASCAP pool and between songs in that pool and the BMI pool. Even if the per-use rates were set by the court (and were standard for different categories of uses), there would still be a highly significant degree of price competition where, in a blanket-only world, there is none.[15]

[15] In this form of per-use system, for example, separately priced music would compete with other separately priced programming elements. Also, no matter how "enormously" transactionally expensive some direct licensing was in relation to licensing from ASCAP, the transactional expenses of licensing "inside" music would

(Footnote continued on next page.)

Hence, what defendants are really saying is that they are *entitled* to bill on a blanket basis and eliminate price competition for the sake of achieving "enormous" transactional efficiencies. But once it is recognized that a collective license of the same coverage could achieve any such efficiencies *and* generate price competition—simply by virtue of billing a separate price for each use—there can be no conceivable justification under the rule of reason for a blanket-only system.

2. But now let's drop the *arguendo* assumption. The reality is that the burden of proving efficiencies is defendants'; they have failed to establish any such point; indeed, the evidence and the findings are to the contrary.

Defendants state that the issue of procompetitive effects (and thus transactional efficiencies) is not reached in this case unless anticompetitive effects have been established (BMI Br. 8-9; ASCAP Br. 30-31). We agree.

On the other hand, once those anticompetitive effects have been established—as they plainly have been here—it is defendants' burden to prove, as the Government has noted (Br. 20), (a) that there *are* procompetitive benefits, (b) that they outweigh those anticompetitive effects, and (c) that defendants' blanket licensing practices are reasonably necessary to achieve such benefits. For not only would the burden of proving the *absence* of procompetitive effects place the antitrust plaintiff in the position of proving a negative, but it is the defendants who are trying to justify a practice shown to have significant anticompetitive effects and they, logically, must carry that burden of justification. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 693, 696 (1978); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1186-87, 1188-89 (D.C. Cir. 1978); *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.,* 194 F.2d 484, 488 (1st Cir.), *cert. denied,* 344 U.S. 817 (1952); *Mardirosian v. American Institute of Architects,* 1979-2

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be virtually zero (400 F. Supp. at 758). It is also true that the incremental transactional expenses of negotiating a direct license to previously published music would be negligible where the packager and the publisher must in any event negotiate a synch rights license.

Accordingly, all such separately priced, directly licensed compositions would compete on a price basis amongst themselves and with the separately priced songs available from ASCAP and BMI under the per-use form of collective license.

Trade Cas., ¶ 62,745, at 78,247 (D.D.C. 1979); *United States v. Jerrold Electronics Corp.,* 187 F. Supp. 545, 558, 560 (E.D. Pa. 1960), *aff'd,* 365 U.S. 567 (1961).

Additionally, a method of licensing which eliminates price competition by its terms (and has effectively precluded it for 30 years) cannot be justified, as the Government also observes (Br. 22 n.15), on the basis of mere transactional savings. At minimum, there must be something so unusually expensive about price-competitive transactions as to prevent the market from functioning on this basis and thus warrant this extraordinary treatment. For example, the transactional expenses of selling automobiles must be a significant percentage of revenues —but the possibility of reducing them would hardly justify the cartelization of that industry.

But defendants have not shown that blanket licensing is more efficient than direct licensing, much less that direct licensing would be so encumbered by extraordinary transactional expenses that such a market would cease to function.[16] In fact, the court found, not only that direct licensing was distinctly feasible, but that it would be "convenient" and "efficient" (400 F. Supp. at 758, 764). And a brief summary of the supporting evidence makes those points even more clearly.

The Harry Fox Agency charges a maximum commission of $150 for any movie rights transaction between $2,000 and $20,000 (which represents a commission rate of between 7½% and *less than 1%*) and 7½% for any deal below $2,000 (Mingle Tr. 854-58; Berman Tr. 958, 961). (License fees for movie rights typically range from $750 to $20,000 (Mingle Tr. 869-70).) That commission covers Fox's total expenses: the time the Fox employee spends on the telephone with the producer and the publisher; the preparation and mailing of the license contract; the billing and collecting of fees; the distribution of revenues; the bookkeeping associated with these operations; and the limited monitoring it does. If we add to that $150 (or

[16] As we have just shown above, if direct licensing were indeed so encumbered, that would simply require that the blanket form of collective licensing give way to the per-use form, which is equally efficient and manifestly less restrictive.

less) figure the time the producer and publisher spend on the telephone with the Fox employee, we are still talking about very small transactional expense.

The evidence shows, and the findings indicate, that performance rights deals would be no more complex or transactionally expensive for television programs than for movies (400 F. Supp. at 763 n.13).

In short, there is no more reason to take performance rights out of the mainstream of our competitive market system than there is to cartelize the sale of automobiles.

3. In point of fact—and though it is defendants' burden to prove the reverse, and then some—there are solid grounds for concluding on this record that direct licensing involves substantially *less* transactional expense than blanket licensing.

BMI claims that this point is "speculation" (Br. 24 n. 14). What is not "speculation" is the fact we emphasized in our main brief (which is not answered by defendants) that the ASCAP overhead is annually close to or more than 20% of its revenues, whereas the Harry Fox Agency's is less than 5% (Br. 39 & n.21, and annotations thereto).

Of course, the Fox overhead figure does not include the small time spent on the phone with a Fox employee by each user and publisher in each transaction. But the ASCAP overhead figure does not include the networks' transactional expenses of dealing with ASCAP, the members' transactional expenses in negotiating a split of the ASCAP pie, the costs to the Department of Justice and the court of engaging in consent decree proceedings and otherwise administering the distribution system in respect of networks, or the economic costs of a misallocation of resources.[17]

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[17] Seeking to paint the blanket licensing system as "straightforward and simple," ASCAP states, extraordinarily, that "[u]nder the blanket license, ASCAP and the user need not keep records of use" (Br. 31). The plain fact is that the network is required by the terms of that license to compile, maintain and transmit to ASCAP detailed logs of every single music use (E 1042, 1048, 1073, 1076-79, 1133, 1135; Poklitar Tr. 2060-64). And ASCAP's own maintenance of those records, in computerized form, represents one of the larger items of its expense (McLaughlin Dep. 110-19; Weisgold Dep. 43-48; Marks Tr. 2465-65a, 2469-72; Cramer Tr. 4255a-56; E 221-24; PX 532).

4. Defendants do point to other supposed "benefits" for networks and themselves—but essentially the same points made above apply to these.

The major benefit to themselves is said to be reducing monitoring costs that would supposedly eventuate in a direct-licensing market (ASCAP Br. 27, 32; BMI Br. 25). But the only connection between joint monitoring and blanket licensing is one that cuts against, and refutes, the argument defendants are trying to make. For while joint monitoring does not require blanket licensing, as the district court found (400 F. Supp. at 781-82 n.23), blanket licensing not only requires joint monitoring but a joint monitoring process vastly more elaborate and expensive than it need be (CBS Br. 24-25, 37).

Although costs of monitoring for distribution purposes would initially be as expensive for per-use licensing as they are for blanket licensing, even that condition would be short-lived. For per-use licensing would inevitably lead to a total direct-licensing system—because it will provide a means for working out the inventory-in-the-can without premium prices, neutralize the members' disinclination to compete, and necessarily spur the creation of direct-licensing facilities—all points that defendants also fail to meet.

5. The other purported benefits to television networks are said to consist of the "programming flexibility" that goes with "immediate access" to music (*i.e.,* the lack of need to negotiate separate licenses for each use) and the indemnification ASCAP gives on music uses (ASCAP Br. 13, 27; BMI Br. 23-24, 29-30).

Both such benefits, if they existed, would also be equally available under per-use licensing. And the more significant we might assume them to be, the larger the antitrust consequence of ASCAP's conditioning their bestowal on the network acceptance of a form of license which eliminates price competition by its terms.

But, in fact, access would be sufficiently prompt, and insurance sufficiently available, for any network's needs in a direct-licensing market. As the district court found, access is prompt enough in the licensing of television synch rights—and there is no inherent reason why music performance rights could not be licensed at the same time (as the two are now licensed

together in the movie rights field) (400 F. Supp. at 759-60, 764). Also, music publishing corporations give indemnification in television synch rights transactions (as they do in the combined synch/performance rights transactions conducted in the movie market) (PX's 550, 552-58). To the unlikely extent that any additional insurance were desired, it would doubtless be available from an insurance company, or the network would become self-insured.

Indeed, these points should be too trivial even to pause upon, were it not for the Government's position. The Government notes that the district court (despite its findings of the feasibility of direct licensing) did not make explicit findings as to whether ASCAP's brand of access and insurance represented significant procompetitive effects which the blanket license was no more restrictive than reasonably necessary to provide. Yet what this position (regarding the putative significance of these network "benefits") really amounts to, as expressed by defendants themselves, is the pretension that they are better judges of CBS's self-interest than CBS is. That assertion is not merely paternalistic, it is patently hypocritical.

Defendants don't care about CBS's self-interest, and there is no reason they should. They dangle purported "benefits" which CBS does not need, as an excuse for thwarting what the Sherman Act requires. And the obvious flimsiness of what is here being dangled should not delay a resolution of this case one minute, let alone plunge it back into another trial.

6. Thus lacking any proven, or even plausible, procompetitive effects in the network market, defendants seek to substitute Supreme Court dicta for such proof. The problem is, that virtually all benefits the Court assumed to exist, the Court itself explicitly associated only with non-network users (99 S. Ct. at 1562-63).[18] Indeed, the Court expressly distinguished

[18] Similarly, the "approval" of blanket licensing defendants infer from the Court's statements regarding the new Copyright Act could not possibly have been applicable to the licensing of networks. For while the new Copyright Act expressly authorizes blanket licensing of certain specified users and grants corresponding exemptions from the antitrust laws (*see* 17 U.S.C. §§ 111(c), (d)(5)(A), 116(a)(2), (c)(2), 118(b), (e)(1)), it does not even mention let alone exempt the practice *vis-a-vis* networks.

the cases by stating that these benefits "may be far less obvious" in the network field (*id.* at 1563).

To be sure, the Court went on to observe that, even for networks, there was reduction *in gross* in one aspect of transactional expenses (attributable to having one collective license instead of many individual licenses). But the Supreme Court was not, and could not rationally have been, prohibiting this Court, as defendants imply, from looking at savings on a *net* basis—*i.e.,* from looking at the costs of blanket licensing that direct licensing would remove, or from looking at the district court's finding that direct licensing was "efficient."[19]

D. The Fallacies of "Single Product," "Restricted Output" and "Favored Treatment" Advanced by *Amici* Copland *et al.*

The arguments of these *amici* reflect certain profound misunderstandings about this case, but it is useful to identify the fallacies.

1. ASCAP, say *amici,* cannot be fixing prices or otherwise violating Section 1 because that statute requires an agreement between two or more parties, and ASCAP is the single seller of a single product. "Its function," they continue,

> "is that of a manufacturer which buys raw materials (the nonexclusive performing rights belonging to others) and combines them into a new, finished product (the blanket license)." (Br. 5)

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[19] Presumably urging another alleged procompetitive benefit, ASCAP asserts that blanket licensing protects its members from CBS's "great" economic power (Br. 32n.). Apart from the legal irrelevancy of this argument (except to the extent it further concedes anticompetitive intent), these facts should be noted: (a) since CBS produces less than 5% of its entertainment programming (*see* 400 F. Supp. at 755), program packagers, not CBS, will generally be dealing with music-publishing corporations; (b) publishers now deal quite happily and successfully with those packagers in movie rights transactions; and (c) the publishers that supply the preponderance of the published music used on CBS (*e.g.*, Warner Communications, Gulf & Western, MCA) are hardly economic pygmies.

Moreover, CBS is not an "unlawful" buying agent for otherwise competing stations, as ASCAP also contends (Br. 32n.). Among the numerous reasons this is so, we would note that, unlike ASCAP members (who are competing sellers), each station affiliated with the network is in a different geographic market.

This fallacy should be immediately apparent; it is the same that undermined ASCAP's symphony orchestra analogy dealt with by this Court in its prior opinion (562 F.2d at 140).

Amici at least acknowledge that their contention is premised on their assumption that blanket licensing achieves "enormous" efficiencies in relation to direct licensing (Br. 6, 10). Indeed, they "hype" that premise further by declaring that, because of those assumed "enormous" efficiencies, "individual use licenses are not even close substitutes for [the blanket license]" (Br. 11).

But if that were true, then the ASCAP blanket license would certainly be in a market of its own, and ASCAP would certainly be an absolute monopolist. Also, ASCAP would certainly have violated the rule of reason by not offering the same efficiencies through per-use licensing.

But, as we have shown, there are no such efficiencies, and that is the end of the separate product contention.

Amici, however, seriously misstate the record when they claim that their "analysis [was] endorsed by the Supreme Court in this case" (Br. 10). The Supreme Court did *not* state that ASCAP was a "single seller"; the Court stated that ASCAP was a single seller *"to the extent that* the blanket license is a different product" (99 S. Ct. at 1564 (emphasis added)). And the Court made it clear that the blanket license was a "different product" only to the extent it was "reasonably necessary"—*i.e.,* fell on the "itchy fingers" side of the line (*id.* at 1562, 1563 & nn.34, 37).

Moreover, the Court never stated that blanket licensing to networks was "reasonably necessary" in contrast to either per-use licensing or direct licensing; had it done so, it would not have remanded this case.[20]

In these circumstances, therefore, the applicable Supreme Court holding is that in *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598 (1951):

> "Nor do we find any support in reason or authority for the proposition that agreements between legally separate per-

[20] When ASCAP claims that "the Supreme Court said" that ASCAP "offers a separate product" (Br. 14), its misstatement of the opinion is more blatant than *amici's* but equally wrong.

sons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."

2. *Amici's* next fallacy is that a restraint on competition may be deemed unreasonable and actionable "only when it leads" to "a restriction upon output" (Br. 13). No court, so far as we are aware, has so held; the Supreme Court has rejected this theory, at least *sub silentio*;[21] and, though erroneous at best, it is an absurd proposition on the facts of this case.

The theory is based on the notion that, if a group of price-fixing sellers cannot reduce their supply, the pressure exerted on them by buyers having all the supply they need will eventually break down the adhesion of the conspiracy and allow price to fall to the point where supply intersects demand. It is for this reason that *amici* declare that "the power to fix prices" can "*only* be exercised by controlling output" (Br. 13, emphasis added).

But what this theory fails to take into account, or to give appropriate weight to, is that *until* the original adhesion of the conspiracy is worn down, and *until* the rigged price can be reduced to the competitive level, the conspiring sellers will profit unduly—*viz.*, that competition delayed is competition restrained. As Justice Stevens stated in this case:

> "The District Court did not find that CBS could cancel its blanket license 'tomorrow' . . . . Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts. . . .

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[21] *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which Professor Bork acknowledges in his book, *The Antitrust Paradox* 281 (1978), is inconsistent with his proposed "restriction on output" requirement for Section 1 violations. *See also Apex Hosiery Co. v. Leader,* 310 U.S. 469, 493 (1940), where the Court stated that the Sherman Act seeks to prevent "restraints to free competition . . . which [tend] to restrict production, raise prices *or* otherwise control the market to the detriment of the purchasers or consumers" (emphasis added)—also quoted in Professor Bork's book (at 88).

> "Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct." 99 S. Ct. at 1570.

Even more importantly, however, in the context of this case, the threshhold premise of *amici's* theory is that sellers sell directly, so that each can be individually pressured by buyers who have ample supply. But defendants here have fixed that one, too—by turning the selling authority over to ASCAP and BMI and thus removing themselves from that competitive pressure.

That is why this consortium of sellers can far more effectively fix prices with a blanket licensing system than they could if the system were per-use or direct licensing. That is why price-fixing by these means is a far worse restraint than a hotel room conspiracy. And that is why they do it this way.

ASCAP and BMI cannot be pressured to reduce blanket prices, no matter how abundant the supply of music performance rights; on the contrary, they are encouraged to demand even higher prices by those very enlargements of their pools.

3. *Amici's* third fallacy is that one group of similarly situated buyers (television networks) cannot lawfully be given "favored treatment" (access to a competitive market) when that treatment must be denied to other groups of users because of the "prohibitive transaction costs" of direct licensing (Br. 6, 27). In other words, access to competition is such a good thing that the law forbids that it be granted to those groups of buyers for whom a competitive market would operate efficiently, if it cannot be granted to other buyers for whom a competitive market will not so operate; all must suffer together.

Ostensibly to support this bizarre proposition, *amici* contend, without benefit of evidence, that the cost of direct licensing would be shifted to ASCAP's members (Br. 23-24). The district court found otherwise:

> "the cost of creating new machinery would be passed on to music *users*, just as it is at present through ASCAP, BMI and the *Fox Agency*." 400 F. Supp. at 764 (emphasis added).

Amici also assert that, while ASCAP could allow direct licensing for any one group of users, it cannot for all (Br. 24, 27). But that is nonsense on *amici's* own premises.

For *amici* say that direct licensing is "enormous[ly]" transactionally expensive (Br. 6, 10, 17, 19). It is not in fact so for networks, as we have shown and the district court has found (400 F. Supp. at 758, 764). But if it is for most other users, as the district court has also found (*e.g., id.* at 741), and the Supreme Court has assumed to be true (99 S. Ct. at 1563), then ASCAP may arguably refuse with good reason to allow it to such other users, but not those involved in this case.

In sum, the "favored treatment" the law forbids is that now being enjoyed by the music publishing corporations which, unlike any other sellers in the United States, have managed to insulate their product entirely from price competition in one of their largest markets without the slightest justification for so doing.[22]

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[22] The blanket-only practice which achieves that result and the economic discrimination discussed below effects an extension of statutory monopolies beyond the limits of their grants and is therefore copyright misuse under the authorities cited in our main brief (Br. 45 n.23). In response to defendants' contentions to the contrary: (a) since a Section 1 violation whose anticompetitive purposes and effects have been proven is no less offensive to copyright policy than one whose effects are presumed, there is no difference material to the misuse doctrine between illegality under the rule-of-reason and illegality *per se*; (b) since the literal fixing of price on millions of songs and the achievement of economic discrimination are as much extensions of the copyright privilege as a simple tie, the misuse offense is as applicable to the former as the latter; (c) that defense is no more affected by the fact that some patents are stronger than some copyrights (or *vice versa*) than it is by the fact that some patents are stronger than some other patents (and this case, of course, involves copyright pools that dominate industries); (d) the misuse doctrine is no more "draconian" for copyrights than for patents, since the owner of the statutory monopoly can always revitalize his rights by purging himself of the misuse; (e) the "balancing test" of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), was based on an interpretation of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), as a partial retreat from earlier misuse decisions, which interpretation subsequent Supreme Court decisions have proven to have been incorrect (*see, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 133-41 (1969)); and (f) the so-called "wrongdoer"-"deliberate infringer" of misused copyrights may well be an infringer only because he has not capitulated to the misuse.

E. Defendants' Briefs Admit the Points of Economic Discrimination Noted by Justice Stevens.

1. Another aspect of this favored treatment, and therefore another anticompetitive effect, is that selling all music for a blanket price discriminates:

(a) against other program elements, which are separately priced;

(b) against music written especially for the program, which is incrementally priced; and

(c) against the less well-established compositions whose owners cannot increase usage and maximize revenues by offering lower prices.

ASCAP concludes that the Supreme Court "explicitly rejected" these points by stating that a flat fee license *"alone"* does not "make out an antitrust violation" (Br. 16). But that statement is hardly an "explicit" *reference* to the economic discrimination point, much less a rejection of it.

Moreover, the point is so self-evident that defendants, albeit unwittingly, admit it (ASCAP Br. 34n.). "In a per-use world," ASCAP states, "ASCAP members are entitled to the view that particular works are worth more—or less—than other works." Of course that's true! What it means is that, under the blanket system, works that are "worth more" will be used more, and the owners of works worth less will not get a chance to bid less and increase their usage.

BMI cites "two examples from the trial record," involving price competition on synch rights (*e.g.*, where the lower priced "O Sole Mio" was used in place of the "perfect" but higher priced "Santa Lucia") which "vividly illustrate this point" (Br. 14). Indeed they do so, and should be consulted.

2. BMI also admits the other aspect of economic discrimination noted by Justice Stevens (99 S. Ct. at 1568)—the ability the blanket license gives ASCAP and BMI to charge each network differently, up to the amount it can pay:

"To the extent the three networks differ in the size of their audiences, they earn different revenues and, accordingly,

the fees for their blanket licenses . . . vary proportionately" (Br. 17).

BMI states this principle as if it were BMI's inherent right to take a split of CBS's revenues. But BMI is not CBS's partner; it gets paid whether CBS makes or loses money. And BMI may now have the power of a government to tax CBS; but it should not, under the antitrust laws, possess that authority.

BMI seeks to defend this discrimination on the ground that it cannot be discrimination to charge a network more than a tavern (Br. 17). But that's hardly what we're talking about. BMI is levying an income tax on competing networks.

Finally, *amici* Copland *et al.* contend that this is no more discrimination than it is for networks to charge advertisers in accordance with audience size (Br. 24n.). But this totally misses the point. Audience size is the only thing that advertisers seek to buy; so there is a natural and direct relationship between what they are paying for and what they receive. Moreover, advertisers pay for each use. In contrast, the fact that ASCAP taxes each network the same percentage of annual revenue irrespective of how much music each network uses is, as the Government states, an "undisputed fact of price discrimination" (Br. 20n.).

F. The Fallacies Underlying Defendants' Attack on Per-Use Licensing.[23]

1. Defendants complain that the withdrawal right, which eliminates any purported "ceiling [price] effect" (and thus all

[23] We also wish here to clear up the confusion the Government brief displays regarding per-use relief.

The Government appears to believe that the CBS per-use proposal in the district court differed from that proposed in this Court, in that the former contemplated per-use fees set by ASCAP and the latter "ASCAP or court-set rates" (Br. 26 n.19). There is no such difference. As the district court itself stated, describing what we had there proposed,

> "If the fee schedule could not be fixed by agreement between CBS and defendants, it would be set by the court." 400 F. Supp. at 747n.7.

The Government further states that "CBS appears to want" the "indemnification" and "immediate access" features of a blanket license that per-use licensing would afford, "without wanting to pay any premium" for them (Br. 26 n.19). To the extent that statement might imply that CBS *prefers* per-use relief to a straight injunction

(Footnote continued on next page.)

of defendants' arguments regarding per-use licensing), would be ineffective because

> "The copyright owner would . . . rarely know, in time to withdraw and negotiate a direct license, that a program producer was interested in using his composition; and any attempt to withdraw would be meaningless if CBS went ahead and put the music 'in the can' before the withdrawal became effective." (BMI Br. 32 n.23; *see also* ASCAP Br. 38n.)

The fairness of not giving a music publishing corporation the right to withdraw ASCAP's authorization to license at a pre-established per-use price (in reliance on which the song was recorded by the packager) is not questioned by defendants, and, we submit, is not questionable.

Nor is the effectiveness of a withdrawal right with the limited music-in-the-can exception. Out of the large number of songs in a music publishing corporation's catalog, there will be a smaller number that produces the preponderance of that company's income. For example, Mills Music, Inc., a perennial ASCAP Board member, has a catalog of some 25,000 songs, of which only 1,500 are still royalty-producing, and, of that number, 114 generate nearly 80% of the royalty income (PX 906). The list of 114 includes such established compositions as "Stardust," "For Me And My Gal," "When You're Smiling," "Moon Glow," and so on.

It should not take Mills Music, or any of the many other music publishing corporations having songs of comparable strength, any appreciable time to conclude that these estab-

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against blanket licensing, it is in error. Our preference is the reverse, as is the Government's:

> "While a court-set schedule appropriately might be considered at the remedy stage if it is the only means of correcting the anticompetitive effects of past conduct, neither an ASCAP-devised nor a court-ordered price list would appear to facilitate competitive pricing as well as direct licensing would." (*Id.*)

Moreover, if such an injunction were not to be issued, and only per-use relief were granted, our per-use proposal has always contained a provision, as the district court acknowledged, for an "administrative fee," which is designed to cover access and indemnification even though we prefer ASCAP removed from the market completely (400 F. Supp. at 747 n.7).

lished favorites or currently popular songs should be withdrawn up front from the coverage of the per-use license. For any song that the publisher might reasonably expect to command a higher price than the per-use price, *under any circumstances,* should be withdrawn, since the publisher will lose *nothing* by so withdrawing.

BMI asserts that CBS "indicated at trial" that it and program packagers would refuse to use withdrawn compositions (*i.e.*, "eliminate withdrawn works from consideration") (Br. 32 n.23). BMI's citations stand for no such proposition; there was no such indication; and the contention is absurd. What BMI is really saying is that a packager will be so fearful that withdrawn songs will be so highly priced that he will not even make a 10¢ phone call to find out what that price is—and so refrain, after having invested valuable production time in selecting that song in the first place (an amount of time, which the evidence shows, is not inconsiderable (Wright Tr. 408-11, 415-18, 467-68; Vincent Tr. 583-88)). The very transcript pages BMI cites, or the adjacent pages, demonstrate exactly the opposite to be true (Sipes Tr. 132-33, 365-67; Wright Tr. 443-44; Vincent Tr. 605-06, 679-84, 697-99).[24]

2. ASCAP says that if many publishers withdraw many songs, CBS will "consult its lawyers" and that "CBS' witnesses so testified" (Br. 38). Again, there is no such testimony. What the witnesses said (in response to ASCAP's questions) is that if a significant number of ASCAP members withdrew their songs from the coverage of the per-use license, and then deliberately rendered themselves unavailable for direct licensing negotiations, CBS would consult its lawyers (Sipes Tr. 175; Stanton D 900). While such consultation would obviously be appropriate in those circumstances, the possibility that ASCAP members might so misuse the right of withdrawal hardly means that such a right would be ineffectual.

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[24] It should be noted that since publishers should withdraw any compositions they believe to be "worth more" (to use ASCAP's words (Br. 34n.)) than a standard per-use price, there is no reason to believe that that price (adjusted periodically to reflect direct licensing prices) would necessarily go down. For the direct licensing prices of music "worth more" should be in excess of the per-use price.

3. It should also be noted that no defendant contends that a music publishing corporation needs a withdrawal right if it states its own per-use prices (*i.e.*, the per-use format indicated in Question No. 5). Defendants' only argument against this sort of system is BMI's complaint that it was a per-use method "concocted" on appeal (Br. 31 n.22). We understand why the Court is interested in alternative per-use methods (of which there may be many possible variations); but the fact that variations are being considered in this, the liability stage of the case, does not preclude the method indicated by the Court (or any other) from being considered at the relief stage.[25]

4. Finally, ASCAP asserts that this Court has no power to "compel ASCAP's members to continue that organization as a common agent to issue per-use licenses" (Br. 41). True or not, that's academic. Certainly the Court has power to enjoin ASCAP and its members from engaging in collective licensing unless they do so on a per-use basis.[26]

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[25] *Amici* Copland, *et al.*, insist that the judicial supervision required to administer a per-use system under which each publisher sets its own per-use price would be extremely costly (Br. 21, 23-24). There is no reason why that should be so.

The purpose of such supervision would be to guard against a tacit, spokes-of-the-wheel price conspiracy. All the Court need do for that purpose (unless defendants do in fact conspire) is to direct defendants not to consult with each other on price, direct ASCAP not to provide the equivalent of such consultation, and then look at the prices actually set to determine whether they show sufficient uniformity to indicate any problem of collusion.

The cost of that supervision should be compared with the costs now incurred by the Department of Justice and the court in conducting far more extensive supervision over ASCAP's distribution formulae in respect of network uses—a system which would be obsoleted if each publisher set its own per-use price.

[26] In an argument against the prohibition of blanket licensing, BMI represents that CBS executives testified that, without the blanket license, CBS programming would be "second class" and "bush league" (Br. 29-30). BMI well knows there was no such testimony. What those witnesses said was that CBS programming would soon have such characteristics if CBS unilaterally attempted a bypass (Sipes Tr. 86; Stanton D 875-77; Wood D 1016-17 Paley Dep., pp. 110-14)—a proposition which BMI fully understands to be different, like night from day, from a market in which the blanket license no longer exists.

G. Defendants' Per-Program Contentions.

There are many reasons why per-program licensing would add to, not cure, the anticompetitive restraints of the present system.[27] Several have already been noted by this Court (562 F.2d at 133-34). But another short answer to defendants' contentions on the subject is this:

The key provision of that license, that a packager can obtain *no* performance rights directly for any program, unless he obtains *all* performance rights directly for that program, creates obstacles to direct licensing, and therefore restraints on competition, which cannot possibly be justified—indeed, which have little, if any, reason for existence other than to impose those restraints.[28]

That "all-or-nothing" provision is, in fact, so inherently unreasonable that the sort of per-program license the district court urged CBS to seek was one "whose price is reduced to reflect the number of direct licenses obtained for the program" and the fee (thus-reduced) made to vary with "the amount of [nondirectly-licensed] music actually performed" (400 F. Supp. at 779-80). Such a license, however, is not a per-program license at all; it is in essence the very per-use format sought (as alternative relief) in this lawsuit.

One further aspect of per-program licensing is worth noting in conclusion. While its all-or-nothing provision would necessarily inflate the sum of any direct licensing prices close to the per-program fee (since each copyright proprietor would know that the user could not escape the full per-program fee unless *all* music to be used could be licensed directly), that full per-program fee would still represent a "ceiling" on direct licensing prices (since no user would be willing to pay a higher total of direct licensing fees than the ASCAP per-program price). Significantly, defendants do not complain about *that*

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[27] *See* CBS's Brief on the prior appeal, at pp. 110-19.

[28] It might also be noted that the necessity to pay the full per-program fee to either ASCAP or BMI if any one song from either pool is used on the program effectively precludes the packager from using both ASCAP and BMI music on the same program. At present, approximately 70% of CBS's programs use both ASCAP and BMI music (PX's 836-37).

ceiling price effect, for the very reason they propose per-program licensing to begin with—*viz.*, that there is not likely to be any significant amount of direct licensing, and certainly no direct licensing at competitive prices, under any such system.

Conclusion

For the foregoing reasons, and those set forth in our main brief, the order appealed from should be reversed with costs and the district court directed to enter judgment on the liability issue in favor of plaintiff.

November 13, 1979

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Appellant, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants-Appellees.	Docket No. 75-7600 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN MURPHY, being duly sworn, deposes and says that he is over 18 years of age, is not a party to the action and resides at 710 Rhinelander Avenue, Bronx, N.Y. 10462.

That on the 13th day of November, 1979, he caused to be served, by hand, on the below-listed attorneys a true copy of (1) CBS's Reply Brief and (2) CBS's Notice of Motion and Affidavit of Alan J. Hruska, by having copies delivered to them at their offices:

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Sworn to before me this
13th day of November 1979.

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